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No. 96-8653

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

KEVIN D. GRAY,
Petitioner,
v.

STATE OF MARYLAND,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Maryland

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici are two national membership organizations and an organization that provides representation to indigent persons accused of crime in the District of Columbia, each of which has an interest in preserving the right of cross-examination in criminal cases.[2]

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 9,000 attorneys. The NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure, and thus, it speaks for more than 28,000 criminal defense lawyers nationwide.

The Public Defender Service for the District of Columbia was established by Congress in 1970 to provide representation to persons unable to afford counsel in criminal and delinquency cases in the District of Columbia. PDS served as counsel for the defendant in *Foster v. United States,* 548 A.2d 1370 (D.C. 1988), a decision holding that the court should consider other evidence in determining whether admission of a co-defendant's confession violates the Confrontation Clause.

The National Legal Aid and Defender Association ("NLADA") is a private, non-profit, national membership organization, founded in 1911. Its membership includes the majority of public defender offices, coordinated assigned

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[1] In accordance with Rule 37.6 of this Court, amici curiae represent that no party other than counsel for amici authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief.

[2] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

counsel systems, and legal services agencies around the nation. Its membership is comprised of approximately 3,000 offices which provide civil and criminal legal services to poor people. NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel.

SUMMARY OF ARGUMENT

The goal of the Confrontation Clause is to assure that evidence in a criminal case passes through a crucible of adversary testing. If evidence cannot be tested by cross-examination, it is inadmissible unless it possesses indicia of reliability that have stood the test of time or that satisfy the court in the place of cross-examination. The custodial statements of a person arrested and charged with murder about the involvement of others are not admissible without an opportunity for cross-examination, because they are so untrustworthy. "[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Williamson v. United States*, 512 U.S. 594, 601 (1994) (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)).

In *Bruton v. United States*, 391 U.S. 123 (1968), this Court recognized that instructions to disregard a co-defendant's statement are not sufficient to protect the accused against the danger of conviction based upon untrustworthy evidence of this type, if the statement is admitted in a joint trial. It often will be possible to redact a statement to remove any reference to the co-defendant, thereby preserving the availability of the statement against the person who made it without putting the co-defendant at risk. In this case, however, the deletions did

nothing to shield Kevin Gray from the incriminating import of his co-defendant's statement. The prosecutor's presentation of evidence and rebuttal summation assured that the jury would have no doubts whatsoever about whether Gray's co-defendant had named him as a participant in the crime.

A principled and workable line can be drawn between the complete redaction of any reference to a co-defendant, as in *Richardson v. Marsh*, 481 U.S. 200 (1987), and an incomplete redaction such as the one presented to the jury here. The "deletions" in this case were red flags that invited the jury's attention and speculation. Yet the co-defendant's statement could easily have been redacted to eliminate any reference to Gray without disadvantaging the prosecution of the co-defendant or distorting the statement's meaning. Given this alternative, the extreme risk that the jury, knowing that the co-defendant had named Gray, would use the evidence against Gray, as well, was unacceptable under *Bruton*. There will be cases in which the prejudicial effect of a co-defendant's statement is slight, but these *de minimis* cases should be treated under the harmless-error doctrine, rather than by diluting the protections of the Confrontation Clause. In this case, the error was prejudicial, requiring reversal of Gray's conviction.

ARGUMENT

A PRINCIPLED AND PRACTICAL LINE CAN BE DRAWN BETWEEN CONFESSIONS THAT PLAINLY INCRIMINATE A CO-DEFENDANT, DESPITE THE REDACTION OF THE CO-DEFENDANT'S NAME, AND CONFESSIONS REDACTED TO ELIMINATE ANY REFERENCE TO THE CO-DEFENDANT.

In *Bruton v. United States*, 391 U.S. 123, 136 (1968), this Court held that the admission of a co-defendant's

confession "posed a substantial threat to petitioner's right to confront the witnesses against him," in violation of the Sixth Amendment, notwithstanding a limiting instruction to the jury to use the confession as evidence only against the defendant who made it, and not against Bruton. *Bruton* rests on two fundamental propositions. *First,* a jury is likely to be swayed by a defendant's hearsay statements incriminating a co-defendant. *Douglas v. Alabama,* 380 U.S. 415 (1965). *Second,* a cautionary instruction will not effectively prevent the jury from making incriminatory use of evidence as powerful as a confession. *Jackson v. Denno,* 378 U.S. 368 (1964). The Court in *Bruton* concluded that jurors often would be unable to follow an instruction to consider a confession only as evidence against the person who made it, and instead, would allow the confession to influence deliberations against a jointly-tried co-defendant as well. The *Bruton* rule is grounded in "the practical and human limitations of the jury system." *Bruton,* 391 U.S. at 135.[3]

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[3] Empirical studies have found that jurors often misunderstand instructions, which "may also reflect the acceptance or resistance of jurors to legal instructions; to the extent that the instruction conflicts with an individual juror's personal sense of justice, that conflict may reduce his or her comprehension and application scores." Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 L. & Soc'y Rev. 153, 194 (1982); *see also* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate,* 67 N.C. L. Rev. 77 (1988); *cf. Tome v. United States,* 513 U.S. 150, 171 (1995) (Breyer, J., dissenting) (jurors unlikely to follow instructions limiting use of prior consistent statements); *Delli Paoli v. United States,* 352 U.S. 232, 247 (1957) (Frankfurter, J., dissenting) (implausible that jurors will follow instruction to disregard co-defendant's confession); *Krulewitch v. United States,* 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (fiction that jurors will follow instructions to disregard evidence as to co-defendants).

Although this Court, by necessity,[4] presumes as a general matter that jurors will follow instructions,[5] its confidence is not without limits. For example, in *Honda Motor Co. v. Oberg,* 512 U.S. 415, 432 (1994), the Court rejected the argument that proper jury instructions imposed a sufficient check on the jury's power to award punitive damages in a civil case: "The problem that concerns us, however, is the possibility that a jury will not follow those instructions and may return a lawless, biased or arbitrary verdict." As this Court noted in *Bruton,* Judge Learned Hand on many occasions derided cautionary instructions to a jury to disregard a co-defendant's confession as a "placebo" and as a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." *Bruton,* 391 U.S. at 134 n.8 (citations omitted). While acknowledging "the impossibility of determining whether in fact the jury did or did not ignore [the codefendant's] statement in determining petitioner's guilt," *id.* at 136, the Court in *Bruton* refused to turn a blind eye to the hazard that the jury would use the confession despite a limiting instruction.

The issue now before the Court is how to apply the *Bruton* doctrine to a confession in which the co-defendant's name is replaced by the word "deleted" or "deletion." In *Bruton,* the confession referred to Bruton by name. In *Richardson v. Marsh,* 481 U.S. 200, 211 (1987), the confession was "redacted to eliminate not only the defendant's name, but

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[4] Reliance on the jury's ability and willingness to follow instructions as a general rule is an inevitable consequence of the strong policies against exposing the jury's actual deliberative process. *See* Federal Rule of Evidence 606(b); *Tanner v. United States,* 483 U.S. 107, 119 (1987).

[5] *See, e.g., Shannon v. United States,* 512 U.S. 573 (1994).

any reference to his or her existence." The Court in *Richardson* held that a completely redacted confession could be admitted in a joint trial without violating the Confrontation Clause.[6] *Richardson* explicitly reserved the question presented here: whether admission of a redacted confession which refers to a jointly-tried co-defendant, but not by name, violates the *Bruton* rule. *Id.* at 211 n.5.

The Court's opinion in *Bruton* anticipated, but did not decide, this question. The Court cited with approval an opinion by Judge Henry Friendly for the U.S. Court of Appeals for the Second Circuit reversing a conviction in a case in which the trial judge had allowed a witness to read a confession to the jury "with the word 'blank' replacing each name except [the defendant who made the statement]." *United States v. Bozza,* 365 F.2d 206, 215 (2d Cir. 1966), *cited in Bruton,* 391 U.S. at 129 n.4. When the jury requested the confession during deliberations, the court gave it to the jury with the names blacked out, subject to an instruction directing the jury not to use the confession against the co-defendants who had objected to its admission. *Id.* The Second Circuit reversed, holding "only that there is a point where credulity as to the efficacy of

[6] The defendant in *Richardson* complained of a much more subtle risk of prejudice than was involved in *Bruton* or in this case. Even though the co-defendant's statement had been redacted to remove any reference to her role in the offense, Richardson argued that the confession harmed her by corroborating other aspects of the government's case. In *Richardson,* therefore, the issue concerned the use of a statement to enhance the credibility of other government evidence, analogous to the use of constitutionally-tainted evidence for the purpose of impeaching or reducing the credibility of evidence presented by the defense, rather than as substantive proof. *See Walder v. United States,* 347 U.S. 62, 66 (1954). It was also true, however, that by presenting an account of the crime from which she had been eliminated, the confession could actually have aided her defense.

such [limiting] instructions with respect to a confession implicating codefendants is overstrained, and this point was reached here." *Id.* at 217. The *Bruton* opinion quotes the following passage from *Bozza* discussing the reality of jury deliberations:

> It is impossible realistically to suppose that when the twelve good men and women had Jones' confession in the privacy of the jury room, not one yielded to the well nigh irresistible temptation to fill in the blanks with the keys Kuhle had provided and ask himself the intelligent question to what extent Jones' statement supported Kuhle's testimony, or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind.

Bruton, 391 U.S. at 129 n. 4 (quoting *Bozza,* 365 F.2d at 215); *see also id.* at 134 n.10 (discussing the practicability of redaction). Nothing has changed in the last three decades that would diminish the risk that a jury -- despite a cautionary instruction -- will use a confession made by one defendant against a co-defendant in a joint trial. The impulse to "fill in the blanks" is as irresistible as ever, as illustrated by the recent nationwide obsession with the identity of the author of the political *roman a clef,* PRIMARY COLORS.

Since this Court's decision in *Richardson,* the lower courts have divided over precisely how to formulate the test for admitting redacted statements.[7] Some courts require an

[7] *See State v. Gray,* No. 15 (Md. Jan. 15, 1997) (J.A. 88, 98-99) (surveying split in authority). Although the Court in *Richardson* explained that it had "granted certiorari because the Sixth Circuit's decision conflicts

incriminating inference to be "compelled," while others look for a "substantial risk" of incrimination. Gray should prevail under either standard, or under any other test faithful to the teachings of *Bruton,* because on this record it is impossible realistically to suppose that Gray's jury did not fill in the "deletions" with his name and that of the only other person ever identified by the police in their investigation. In our view, however, the inquiry should not turn on the semantics of probability ("compelled" rather than "substantial" risk), but rather on a principled distinction between "me only" confessions such as the one admitted in *Richardson,* and statements that refer to or can be linked to co-defendants, even when the names are veiled by magic marker, white-out, or "neutral pronouns." A cautionary instruction does nothing to dissuade, and may even invite, jurors to connect the word that

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with those of other Courts of Appeals which have declined to adopt the 'evidentiary linkage' or 'contextual implication' approach to Bruton questions," *Richardson,* 481 U.S. at 206, the Court explicitly confined its resolution of this conflict to statements such as those in *Richardson,* without reaching the application of *Bruton* to statements, such as the one in this case, which are redacted in such as way as to call attention to what has been omitted, leaving little to the jury's imagination or inference. Some courts have read *Richardson* broadly to stand for the proposition that the decision whether to admit a confession should be made entirely without regard to the other evidence heard at trial -- requiring, in other words, that a redacted confession be viewed in isolation. *See, e.g., United States v. Green,* 115 F.3d 1479, 1485 (10th Cir. 1997); *United States v. Jimenez,* 77 F.3d 95, 98 (5th Cir. 1996); *United States v. Sherlin,* 67 F.3d 1208, 1215 (6th Cir. 1995); *United States v. Williams,* 936 F.2d 698, 700 (2d Cir. 1991) (redacted confession must be viewed in isolation); *United States v. Vogt,* 910 F.2d 1184, 1192 (4th Cir. 1990). We believe, however, that a narrower reading is more appropriate. To begin with, if the *Richardson* Court had intended to adopt such a broad rule, it would not have reserved the question presented here. Second, the broader issue was not before the Court. Third, context is always relevant to meaning; evidence in a jury trial is no exception.

has so obviously been deleted to the person to whom they have just been told not to connect it.

A. A Principled Line Can and Should Be Drawn Between Confessions Redacted to Implicate Only the Declarant and Portions of a Confession Referring, Directly or Indirectly, to a Jointly-Tried Co-Defendant.

In *Cruz v. New York,* 481 U.S. 186, 191 (1987), this Court made clear that *Bruton* had announced a categorical rule based on the risk that, in general, juries will be unable to follow instructions to disregard a co-defendant's confession, rather than an ad hoc determination to be made depending on the facts of each case. This case requires the Court to draw the line between a completely redacted confession, such as was admitted in *Richardson,* and a confession referring to the co-defendant by name, as in *Bruton.*

The critical distinction between a redacted confession such as the one in *Richardson,* which eliminated any reference to a third party, and a confession that only superficially conceals its subjects without preventing the jury from using the co-defendant's confession as powerful evidence of guilt, is one grounded in principle. As this Court recognized in *Williamson v. United States,* 512 U.S. 594 (1994), the inherent trustworthiness of statements against the declarant's own penal interest does not extend to the portions of statements that inculpate supposed accomplices. In *Williamson,* the Court rejected the government's position that if part of a statement is against the declarant's penal interest, the entire statement is admissible under a hearsay exception. The Court ruled that the rationale for admitting declarations against penal interest does not apply to portions of a statement that incriminate others.

An arrestee who has decided to confess may have

strong motives to implicate others falsely. For example, by naming an "*accomplice," the arrestee may shield his true partner in crime. Or, by placing blame on others, he may diminish his own culpability and probable sentence. "[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Id.* at 601 (quoting *Lee v. Illinois,* 476 U.S. 530, 541 (1986)). As *Williamson* illustrates, there is nothing unworkable about a rule that separates those portions of a statement that incriminate the speaker from those less reliable portions that involve others. A "me only" confession of the type admitted in *Richardson* preserves the most reliable aspects of a statement for the jury's consideration, while weeding out those that are less intrinsically reliable and that are likely, despite a limiting instruction, to be used as evidence not subject to the defendant's confrontation rights.

B. The Rationale of *Bruton* Extends to Confessions in Which the Co-Defendant Is Identifiable, Whether or Not the Co-Defendant Is Referred to by Name.

Bruton is rooted in common sense and life experience. A jury that has heard a confession by one defendant implicating a co-defendant who is also on trial, will be unlikely to obey an instruction that requires the jury to consider the evidence against the defendant who made the statement, but not at all against the co-defendant.[8] This risk is not eliminated, or even

[8] An instruction to the jury to disregard the confession as to the co-defendant may make little sense to the jury, unlike an instruction to disregard an eyewitness identification that the evidence has shown to be unconstitutionally suggestive and unreliable. *See Watkins v. Sowders,* 449 U.S. 341, 347 (1981). Defense counsel cannot very well argue the unreliability of the co-defendant's confession insofar as it relates to his or her client, without fatally undermining the instruction to disregard the statement entirely. Consequently, the jury is faced with a command to ignore -- for no apparent reason -- what appears to be highly probative evidence. By contrast, the reasons for disregarding a suggestive identification would be apparent from the evidence.

substantially reduced, by cosmetic surgery on the confession of the kind practiced in this case. While it is true that Gray's name nowhere appears in Bell's redacted confession, it was obvious to any member of the jury that one of the "deletions" referred to Gray, and the other to "Tank" (Jacquin Valandingham), the third identified participant in the affray who, the jury learned, was not on trial because he had been killed.

Context is not irrelevant to the risk that a jury will use one defendant's confession against another. *Cf. Bourjaily v. United States,* 483 U.S. 171, 179 (1987) (evidence gains probative force from surrounding evidence). A confession redacted to conceal all but the initial of the co-defendant is incriminating because of the context, as is a confession referring to the co-defendant by nickname, or by a description. *See Harrington v. California,* 395 U.S. 250, 253 (1969) (Court assumed that the jury had inferred that the defendant was "the white guy" referred to in co-defendants' confessions, but finding the *Bruton* error harmless).

Similarly, a confession in which names are concealed by white-out or marker generally conveys something about the length of the name that has been concealed, and it certainly conveys to the jury that something (probably of great interest) is being hidden. "In those instances [when the inferential step that the jury must take is so small as to be no step at all], the act of redaction becomes a mere formalistic exercise devoid of the

Constitutional protections undergirding *Bruton,* and the confession's exclusion from evidence is warranted." *State v. Gray,* No. 15 (Md. Jan. 15, 1997) (J.A. 100). Confrontation rights cannot depend upon whether a *name* is used in a confession, as opposed to any other form of identification, whether an abbreviation, nickname, or "neutral" label, the true meaning of which is evident from context.[9] Certainly no court would deny a criminal defendant the right to confront a witness just because the witness referred to the defendant in his testimony by a description, a "neutral pronoun," or a label such as "blank" or "deleted."

In contrast to *Richardson,* in which this Court expressed concern that leaving the admissibility of a statement entirely contingent upon the surrounding evidentiary context would leave trial proceedings vulnerable to manipulation by the defense, *Richardson,* 481 U.S. at 209, this case illustrates the ways in which the prosecution can manipulate the context to ensure that the meaning of a partially redacted confession is not lost on the jury. *See id.* at 210 (remanding for determination whether prosecutor's effort to undo limiting instruction violated the due process clause). Here the prosecution adduced testimony from the lead detective about the course of the investigation that made it clear that Gray, Tank, and Bell were the only persons ever identified as having been involved in the beating. (Tr. III. 15). Immediately after eliciting Bell's statement from the detective who took it, the prosecutor asked, "now, officer, after he [Bell] gave you that information, you subsequently were able to arrest Mr. Kevin Gray, is that correct" (Tr. III. 33), thereby explicitly connecting Bell's

[9] The Court's rejection of "context" in *Richardson* arose in discussing a confession no part of which implicated the co-defendant, as opposed to one that on its face incriminated the co-defendant, but which required context to identify him. *See Richardson,* 481 U.S. at 208-09.

statement to Gray's arrest. For this reason, the fact that several other unidentified persons may have been implicated in the assault did not cast any doubt on the supposition that Gray was named in the confession. Also, the redacted confession referred to "deleted and a few other guys," and to "me, deleted, deleted, and a few other guys," assuring there would be no confusion about when Bell was referring to Gray or Tank as opposed to one of the unidentified "other guys." (J.A. 54-56 (typescript version); J.A. 65-68 (handwritten version)).

Moreover, the prosecution made sure that the jury did not lose sight of the inculpatory force of Bell's statement that "deletion" wore a distinctive jacket. The State elicited testimony from witnesses linking Gray to a jacket emblazoned with "Park Heights," and thus assured that the jury would connect him with Bell's answer to the question, "[w]ho else has these jackets," which otherwise had nothing to do with the incident on trial. (Tr. II. 125; Tr. II.206). The only relevance of this testimony was to tie Gray to Bell's confession. The trial judge's instruction to the jury *not* to consider the confession as evidence against Gray -- given that the confession did not use his name -- could only have confirmed the jury's inference that "deletion" was Gray's alias.[10] The prosecutor also guaranteed that the cautionary instruction was ineffective by invoking Bell's confession in her rebuttal argument, without limiting its relevance to Bell:

[10] The only possible source of confusion was over whether a particular "deletion" referred to Gray or to "Tank," but this only made matters worse for Gray, because the jury may have speculated that Gray, rather than "Tank," was the person who first argued with the decedent and who later ran after him and was therefore even more culpable.

> And, ladies and gentlemen, you don't just rely on the State's witnesses. Mr. Bell, Mr. Bell tells you, an argument broke out between Tank and Stacey in the 500 block of Louden Avenue, somewhere down here. Stacey got smacked and then ran onto Wildwood. Me and a few other guys ran after Stacey. Me, *and he was identified by Tracey, Kevin was identified by Tracey and Shay as being in the pack*, and he was identified and he put himself there.

(J.A. 50-51; Tr. IV.123) (emphasis added). This argument wove Bell's confession seamlessly into the other testimony, leaving the jury with no doubts whatsoever about the identity of "deleted," or about how it was supposed to use Bell's confession to evaluate the proof against Gray.

This case illustrates why it is futile to draw a principled distinction between a confession redacted as this one was and a confession that is not redacted at all. While some confessions will be more damaging to a co-defendant than others, the extent of the damage hinges not only on whether the co-defendant is identified by name, as opposed to pseudonym, but also on how much damaging information the confession contains, how credible it seems to be, and how much other evidence is available to persuade the jury without the confession. "Deleted [the co-defendant] shot him," will generally be more prejudicial than a passing reference to the co-defendant by name. If *Bruton* required nothing more than covering the co-defendant's name with "deletion," it would be, in Judge Learned Hand's words, a "placebo," rather than a cure, for a violation of the Confrontation Clause. Sometimes placebos work, but only because the patient cannot tell the difference between the placebo and the real medication. But any jury can tell by looking at or listening to the confession admitted in this case

that something important is missing.

The Sixth Amendment deserves more than a fig leaf. In *Richardson*, the Court upheld the admission of a confession that was redacted to eliminate not only the co-defendant's name, but any reference to her existence. In this way the statement did not call attention to the fact that it had been altered and that something had been omitted, significantly reducing the likelihood that jurors would attempt to guess at what the confessing defendant had to say about his co-defendant. *See United States v. Long*, 900 F.2d 1270, 1280 (8th Cir. 1990); *Smith v. United States*, 561 A.2d 468, 474 (D.C. 1989). Thus, unlike here, there were no blanks for curious jurors to fill in from the surrounding evidence.

Redactions of the form adopted in *Richardson* allow the prosecutor the use of reliable evidence against the declarant, without inspiring the jury to make use of far less reliable information implicating the co-defendant. In cases in which it is impossible to redact the statement to eliminate any reference to the co-defendant without distorting its meaning in a way that would be unfair either to the defendant who made the statement or to the government, however, the trial court will have to sever the trials or empanel separate juries.[11] An inquiry that focuses on whether a proposed redaction would *effectively* delete any reference to a non-confessing co-defendant is consistent with the purpose of the Confrontation Clause and with the truth-seeking function of a criminal trial jury.

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[11] Ordering severance when redaction would compromise the specific trial right of the defendant who made the confession to have the jury hear a complete and accurate account, would be consistent with this Court's decision in *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

C. Trial Judges Need a Clear and Practical Standard for Considering Alternatives Such as Severance or Complete Redaction That Can Be Applied on the Basis of Information Known Before Trial.

There are significant practical advantages to a rule permitting the admission of "me only" statements, but prohibiting veiled references to co-defendants in joint trials. It is important for trial judges to be able to determine in advance of trial whether a confession can be redacted, whether the trials of the co-defendants must be severed, or whether other means such as the use of two juries should be employed to avert prejudice to the co-defendant. *Richardson*, 481 U.S. at 209. Decisions about whether to sever the trials of co-defendants or to redact a confession are generally made before the jury is empaneled and before the evidence is in. The timing makes it difficult for a trial judge to be confident about what evidence will be admitted and about how the evidence might link a co-defendant's confession to a defendant in a joint trial. *See id.* at 209 (not even possible to predict admissibility before trial). Instead of laying odds on the way the evidence will come in at trial, judges should follow straightforward and predictable rules that protect the accused against the incriminatory import of a co-defendant's confession without impairing the integrity of the trial.

There is no reason to take extreme risks that the jury will pierce the veil of a redacted confession because there are "alternatives [to admitting an incompletely-redacted confession] that would have both assured the integrity of the trial's truth-seeking function and eliminated the risk of the jury's improper use of evidence." *Tennessee v. Street*, 471 U.S.

409, 415 (1985).[12] Bell's confession could have been redacted to "eliminate . . . any reference [to Gray's] existence," *Richardson*, 481 U.S. at 211, without distorting the significance of the confession with respect to Bell's culpability, or depriving the jury of relevant evidence.

Bruton is not an exclusionary rule. The prosecution may use a confession without restriction against the person who made it in a separate trial. In a joint trial, the prosecution may redact a statement so that it refers and can be linked only to the person who made it. Neither alternative limits the availability of evidence for a legitimate purpose; both alternatives avoid the prejudicial impact of a confession that is misused to implicate a co-defendant. The availability of these alternatives makes the risk of which the Court spoke in *Bruton* unacceptable. *Cf. Old Chief v. United States*, 117 S. Ct. 644, 652 (1997) (probative value may be calculated by comparing evidentiary alternatives); *see also id.* at 644 n.10 (discussing redaction).

In this case, for example, the court could have required a redaction of Bell's statement consistent with *Richardson*. There was no dispute that "a few other guys" were involved in beating the decedent. Bell's confession could have been

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[12] In *Tennessee v. Street*, by contrast, the co-defendant's confession was admitted to rebut Street's claim that his own confession was a coerced imitation. This was a legitimate purpose that did not implicate the *Bruton* rule, because the defense had a full opportunity to cross-examine the sheriff about the circumstances of the confessions, and the co-defendant's confession was not admitted for its truth. Because of the risk that the jury might nevertheless misuse the confession as substantive evidence of guilt, the Court went on to consider whether the risk could have been avoided "without detracting from the alleged purpose for which the confession was admitted." 471 U.S. at 415. The Court concluded that the State's legitimate purpose could not have been achieved by sanitizing the confession, observing that the defendant's trial already had been severed from those of his co-defendants. *Id.* n.7.

redacted to eliminate any reference to specific individuals, while retaining the information that he was part of a group. The detective's questions that related only to the identity of other participants could have been eliminated entirely without distorting the meaning of Bell's confession with respect to his own involvement.[13] Alternatively, the court could have severed Bell's and Gray's trials. The joint trial lasted only three days, and each separate trial would have been shorter. And, in the real world, the second trial often will be unnecessary. The outcome of the first trial may well produce a guilty plea to a lesser charge or a dismissal. In short, the danger that the jury would be exposed to powerful evidence implicating Gray in the beating could have been avoided without any real cost to the prosecution or to the jury's ability to determine the facts.

A straightforward requirement that only those statements that are completely redacted to eliminate any reference to the co-defendant may be admitted in a joint trial will be much easier for trial judges to apply than a rule that requires them to forecast what evidence will be adduced at trial. Such a requirement also avoids the unfairness of the fiction that if the co-defendant's name does not appear in the statement, it is not incriminating. In those instances in which redaction is not possible, severance will be required. But the administrative costs associated with holding a second trial should receive less weight in the constitutional calculus than the potential for suppression of relevant evidence.

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[13] To illustrate this point, we have attached an alternative redaction in an Appendix to this Brief.

D. *De Minimis* Cases Should Be Handled Under the Harmless-Error Doctrine, Rather than as Exceptions to *Bruton*.

We recognize that there may be instances in which the incriminatory potential of a co-defendant's statement in a joint trial may prove to be *de minimis*. These cases are better handled, however, by applying the harmless-error rule, rather than by weakening the protections of the Confrontation Clause. Many of the lower court opinions upholding convictions despite the admission of a partially-redacted co-defendant's confession rely on an assessment of the overall risk of prejudice, rather than on the specific likelihood that -- despite a limiting instruction -- the jury will use a co-defendant's confession against the accused. These issues are analytically distinct. If the jury is likely, as it was in this case, to infer the identity of "deleted" from the surrounding context, then the rationale of *Bruton* applies, and a limiting instruction will not prevent the jury from misusing the confession as evidence of another defendant's guilt. Whether, all things considered, the potential misuse of such evidence is harmless beyond a reasonable doubt in light of all the evidence should be addressed under the *Chapman* rubric, *see Chapman v. California*, 386 U.S. 18 (1967), rather than by diluting *Bruton* to the point where it is nothing more than a "placebo."

When the likelihood that a jury will draw an inculpatory link between the accused and a co-defendant's confession is remote, the incriminatory significance of the statement slight, or the other evidence of guilt conclusive, the admission of the statement may be harmless. This Court long ago ruled that violations of *Bruton* are subject to the *Chapman* harmless-error standard. *See, e.g., Brown v. United States*, 411 U.S. 223 (1973); *Schneble v. Florida*, 405 U.S. 427 (1972); *Harrington v. California*, 395 U.S. 250 (1969). Since *Harrington*, this

Court has concluded on several occasions that possible *Bruton* violations were harmless beyond a reasonable doubt. The *Chapman* standard (or, in federal habeas corpus actions, the standard announced in *Brecht v. Abrahamson,* 507 U.S. 619 (1993)) is a familiar and easy one for an appellate court to apply after the trial has been completed and the evidence is in. The harmless-error doctrine is a more finely tuned instrument for identifying *de minimis* cases than a "redaction" exception to *Bruton*.

In reversing Gray's conviction, the Court of Special Appeals concluded that "Bell's statement 'might well have tipped the balance in the juror's minds in favor of conviction.'" (J.A. 87) (citation omitted). "Indeed," the Court of Special Appeals observed, "the testimony of some of the witnesses on which the State relies may not have been compelling in the minds of the jurors. Brumfield was not herself a witness to the altercation that resulted in Williams' death and Yarborough's allegedly differing statements could have adversely affected his credibility." (*Id.*). The evidence was in conflict as to whether Gray was near the beating, speaking on a public telephone to his girlfriend, or whether Gray was a participant in the melee. The error here was not harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse Gray's conviction and remand the case for a new trial.

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Appendix

APPENDIX

(Statement Redacted to Eliminate "Deleteds")

Question: what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?

Answer: an argument broke out between [Tank] and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, [Tank] and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.

Question: when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer: hit, kicked.

Question: who hit and kicked Stacey?

Answer: I hit Stacey. He was kicked, but I don't know who kicked him.

Question: who was in the group that beat Stacey?

Answer: me, ~~deleted, deleted,~~ and a few other guys.

~~*Question*: do you know the other guy's names?~~

~~*Answer*: deleted, deleted, and me. I don't remember who was out there.~~

Question: did anyone pick Stacey up and drop him to the ground?

Answer: no, when I was there.

Question: what was the argument over between Stacey and [Tank]?

Answer: some money that Stacey owed [Tank].

Question: about how many guys were hitting on Stacey?

Answer: about six guys.

~~*Question*: do you have a jacket with Park Heights written on the back?~~

~~*Answer*: yes.~~

~~*Question*: who else has these jackets?~~

~~*Answer*: deletion.~~

Question: after reading this statement, would you sign it?

Answer: yes.